

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation	)	
of the	)	
	)	
DEPARTMENT OF FAIR EMPLOYMENT	)	Case No. E 95-96
AND HOUSING	)	C-0675-
	)	
v.	)	00-pe
	)	98-18
	)	
BEVERLY HEALTH AND	)	
REHABILITATION SERVICES, INC.,	)	
	)	
Respondent.	)	
-----	)	DECISION
-	)	
PATRICIA GRAY-OLIVER,	)	
	)	
Complainant.	)	

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The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the discussion on the Workers' Compensation Act, found at pages 8 and 9 of the decision, as precedential, pursuant to Government Code sections 12935, subdivision (h), and 11425.60.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

**DATED: December 9, 1998**

**FAIR EMPLOYMENT AND HOUSING COMMISSION**

LYDIA I. BEEBE

PHYLLIS W. CHENG

T. WARREN JACKSON

EUIWON CHOUGH

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Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on June 17 and 18, 1997, in Fresno, California. Michael F. Sweeney, Senior Staff Counsel, and Andrew Haley, Law Clerk, represented the Department of Fair Employment and Housing. Walter W. Whelan and Ellen Weitz, Attorneys at Law, represented respondent Beverly Health and Rehabilitation Services, Inc. Complainant Patricia Gray-Oliver and respondent representative Julie Whiteside were present during both days of hearing. The record was held open for the filing of post-hearing briefs. The respondent and Department timely filed post-hearing briefs, respectively, on August 22 and 25, 1997.

On August 25, 1997, pursuant to a stipulation by the parties, the Commission issued an order staying this matter, pending a decision by the California Supreme Court in either

Cammack v. GTE Corporation, et al., No. S056183, or City of Moorpark v. Super. Ct., No. S057121. Thereafter, on September 16, 1998, the California Supreme Court issued a final decision in City of Moorpark v. Super. Ct. (1998) 18 Cal.4th 1143. Pursuant to the Commission's Stay Order, the Hearing Officer gave the parties the opportunity for further briefing, which they declined, and this matter was submitted on October 15, 1998.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

#### FINDINGS OF FACT

1. On March 27, 1996, Patricia Gray-Oliver (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department or DFEH) against Fowler Convalescent Hospital. The complaint alleged that, within the preceding year, complainant was denied a transfer on the basis of a perceived disability (back injury), in violation of the Fair Employment and Housing Act (Act or FEHA) (Gov. Code, §12900, et seq.). Beverly Enterprises and Beverly Manor were also named in the body of the complaint. Complainant filed an amended complaint on January 24, 1997, adding an additional allegation that less qualified persons had been hired instead of her.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h), of the Act. On March 26, 1997, Nancy C. Gutierrez, in her official capacity as the Director of the Department, issued an accusation against Beverly Health and Rehabilitation Services, Inc. (Beverly Health or respondent), as the owner of the College Oak Nursing and Rehabilitation Center (College Oak), Beverly Manor Convalescent (Beverly Manor), and Fowler Convalescent (Fowler) facilities. The accusation alleged that respondent subjected complainant to

unlawful discrimination on the basis of physical disability or perceived physical disability, in violation of Government Code section 12940, subdivision (a). The accusation also alleged that respondent failed to make reasonable accommodation, in violation of Government Code section 12940, subdivision (k), and unlawfully required complainant to complete and submit an application requesting information regarding her medical history and physical condition, in violation of Government Code section 12940, subdivision (d). Finally, the accusation alleged that respondent failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (i).

3. Respondent Beverly Health owns and operates a number of skilled nursing facilities in California, including College Oak, in Sacramento, and Beverly Manor, in Fresno. Respondent Beverly Health is an employer within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a), (d), (i), and (k).

4. From approximately 1971 to early 1980, complainant worked as a nursing assistant. In early 1980, complainant became a Certified Nursing Assistant (CNA) and thereafter worked in that capacity. From 1991 until 1994, complainant cared for members of her family, including her disabled brother, and did not work.

5. In April 1994, respondent hired complainant to work as a CNA for College Oak. Complainant's essential job duties included assisting residents with eating, bathing, dressing, grooming, using the toilet, changing their bed linens, and transferring them in and out of bed or chairs.

6. In February 1995, complainant sustained a work-related injury to her back and shoulder while helping another College Oak employee lift a patient. Complainant verbally reported the injury to the charge nurse for her shift, and then later that same night signed an incident report.

7. Thereafter, complainant continued to perform her duties, but with some pain. Complainant's College Oak co-workers helped her perform her heavy lifting duties in exchange for complainant performing other duties for them.

8. By April 1995, complainant's pain had worsened and she became concerned about patient safety when she was performing lifting duties. She went to her doctor, who examined her and recommended that she be placed on light duty status, restricting her from lifting over 45 pounds or reaching upward. As a result of her doctor's recommendation, which complainant submitted to respondent, respondent placed complainant on light duty.

9. In March or April 1995, complainant informed Kathy Zacarias, the College Oak Administrator, that she would be moving to Fresno and asked Zacarias whether respondent had any facilities in that area. Zacarias gave complainant the names of three of respondent's facilities in the Fresno area, including Beverly Manor. Zacarias told complainant that she would have to fill out a transfer form at College Oak and a new application at the Fresno facility where she wanted to work. Zacarias also told complainant that transfers were handled by the administrators of each facility and that complainant should tell the Fresno facilities that she was on light duty status.

10. Later that same day, complainant spoke by phone to Donna Rhames, Director of Staff Development at Beverly Manor. As part of her duties, Rhames hired CNAs for the Beverly Manor facility. Complainant told Rhames that she was employed at College Oak, explained her duties there, and said she would be seeking a transfer to the Fresno area. Rhames told complainant that Beverly Manor was hiring but explained that complainant would need to come to Fresno to fill out an application.

11. After talking with Rhames, complainant spoke with Zacarias for a second time that day. Zacarias reiterated the procedure for obtaining a transfer, gave complainant a

transfer form to complete, and gave complainant a list of respondent's facilities in the Fresno area.

12. Respondent's transfer policy provides that an employee may request a transfer to another facility, but that the transfers are discretionary and allowed only if respondent determines that the transfer is advantageous to both the employee and the company. All transfers must be approved by both the administrators of the transferring facility and the facility to which the transfer is requested.

13. In May 1995, complainant filed a workers' compensation insurance claim, alleging a work-related injury to her shoulder.

14. Around the end of May 1995, complainant told Kathy Zacarias that she would be resigning from College Oak within three weeks. Zacarias gave complainant a "Resignation Notice" form to fill out.

15. On or about June 1, 1995, complainant submitted a completed "Resignation Notice" to College Oak, notifying College Oak that her last day of work would be June 21, 1995.

16. On June 15, 1995, complainant went to Beverly Manor, in Fresno, California, accompanied by Claudette Anderson, the mother of complainant's daughter-in-law. At Beverly Manor, complainant told Delores Richey, Beverly Manor's Assistant Administrator, that she sought a transfer from Sacramento. Richey gave complainant an employment application and some other forms to fill out.

17. Complainant indicated on her application that she would be available to begin working on July 8, 1995, and that she sought full-time employment during either the evening or night shifts, but did not want to work the day shift. She also indicated that she was available to work weekends.

18. That same day, complainant spoke with Donna Rhames in Beverly Manor's lobby. During this conversation,

complainant told Rhames that she had worked for the Sacramento College Oak facility as a CNA and that she wanted to transfer to the Fresno Beverly Manor facility. Complainant described her duties at College Oak and her shift preferences. Complainant told Rhames that she would be moving to Fresno toward the end of June, and that she would be available to start work at Beverly Manor a "few weeks after that." Complainant also told Rhames that she was on light duty at College Oak. Complainant explained that this meant she should not lift more than 45 pounds or reach upward. Complainant told Rhames that her condition was temporary and that she fully expected the light duty restrictions "to be over soon," but did not know when. Rhames told complainant that she would need to submit a doctor's release before she would be able to come to work for Beverly Manor.

19. A few days later, complainant returned to Sacramento and submitted her transfer request form to Kathy Zacarias. On the request form, complainant stated that she wanted to transfer to Beverly Manor. Complainant's last day of work at College Oak was June 21, 1995.

20. On or about June 23, 1995, complainant moved to Fresno. Complainant had to do a number of move-related tasks for her disabled brother, including finding a health facility and social worker, enrolling him in school, and securing transportation.

21. Within one or two weeks after complainant moved to Fresno, she called Beverly Manor and told Donna Rhames that she had moved to Fresno.

22. On August 17, 1995, complainant's doctor examined and released complainant to return to work without restriction. On August 17 or 18, 1995, complainant gave a "return to work" note from her doctor to Donna Rhames. The "return to work" note, which stated that complainant's diagnosis was "strain trapezius," was without work-related restrictions. Complainant asked Rhames when she could start her orientation. Rhames said that she needed to talk with

College Oak before complainant could begin working and that she would be in touch with complainant after that conversation. Complainant asked Rhames whether Beverly Manor was hiring and Rhames said yes. Complainant then told Rhames that she was available to start work anytime.

23. The following day, complainant called Donna Rhames to inquire about the status of her application. Rhames told complainant that she had not spoken to anyone at College Oak, but that she would do so within the next several days. Within the next few days, complainant again called Rhames to inquire about her status. Rhames told complainant that she had spoken with complainant's references at College Oak and was surprised to learn from them that complainant was "on medical." Rhames understood this to mean that complainant was "medically not well enough to work." Complainant explained to Rhames that this was a mistake and that she had not been on "medical" or "disability." Rhames told complainant that she would be in touch with her.

24. Several days later, complainant again called Rhames to inquire about the status of her employment application. During this discussion, Rhames told complainant that Beverly Manor was not hiring at that time because the facility had just hired a number of student graduates. **Thereafter, neither Rhames nor anyone else at Beverly Manor called complainant about a position at Beverly Manor.**

25. Respondent operates a training facility, Beverly Training Center, from which its various facilities hire CNAs who have completed training and received state certification. In addition, Beverly Manor has a ten-week in-house training program for its current nursing assistants who are interested in becoming CNAs. After these nursing assistants complete their training and receive the state certification, their status changes and they become CNAs for respondent.

26. In September 1995, complainant applied to two other Beverly Health facilities, as well as to several other

health facilities in the Fresno area. On September 25, 1995, complainant began working as a CNA on the night shift at Casa Metropolitan, a facility unaffiliated with respondent.

27. Respondent has a lengthy written policy entitled "Guide for Understanding and Compliance" of the Americans with Disabilities Act. The policy has extensive discussion about the law and sets forth procedures for implementing it.

28. On some date unspecified in the record, complainant filed another workers' compensation insurance claim which alleged a violation of California Labor Code section 132a and asserted that respondent denied her employment because of her previous workers' compensation insurance claim. On or about March 10, 1997, complainant settled both of her workers' compensation insurance claims with respondent.

#### DETERMINATION OF ISSUES

##### Jurisdiction

Respondent asserts that the Commission is precluded from reaching the merits of this case on several jurisdictional grounds, as described below.

##### A. Workers' Compensation Act as Exclusive Remedy

Respondent argues that complainant's FEHA claim is barred by her earlier Workers' Compensation Appeals Board action under Labor Code section 132a. The Commission has previously held that the Workers' Compensation Act precludes a disability discrimination claim under FEHA. (DFEH v. Southern Cal. Gas Co. (1994) FEHC Dec. No. 94-09 [1994 WL 912232; 1994-

95 CEB 1].)1/ The Commission's holding, however, is no longer viable in light of City of Moorpark v. Super. Ct., supra, 18 Cal.4th 1143. In Moorpark, the California Supreme Court held that section 132a "does not provide an exclusive remedy" for disability discrimination claims and does not preclude an employee from also pursuing remedies under FEHA. (Id. at p. 1148.) Accordingly, complainant's section 132a action does not bar the instant FEHA claim.

#### B. Actual or Perceived Physical Disability

Respondent also asserts that complainant does not have an actual or perceived disability, as defined by the Act. Based on the factual record in this case, this argument is persuasive.

The Act provides that the term "physical disability" includes, among other things, having a physiological disease or disorder which: 1) affects the musculoskeletal or cardiovascular system; and 2) limits an individual's ability to participate in major life activities. (Gov. Code, §12926, subd. (k)(1).) "Being regarded as having or having had" such a disease or disorder also constitutes a "physical disability" under the Act. (Gov. Code, §12926, subd. (k)(3).) Thus, the Act forbids discrimination against individuals who have a "physical disability" or who are regarded as "having or having had" a physical disability. (Gov. Code, §§12926, subd. (k)(3), and 12940, subd. (a); DFEH v. Silver Arrow Express, Inc. (1997) FEHC Dec. No. 97-12 [1997 WL 840029; 1996-97 CEB 2]; Cassista v. Community Foods (1993) 5 Cal.4th 1050.)

The accusation in this case alleges that respondent discriminated against complainant because of "physical

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1/ The parties stipulated to stay this matter until the California Supreme Court issued a decision in either Cammack v. GTE Corporation, et al., No. S056183, or City of Moorpark v. Super. Ct., No. S057121, two FEHA cases which raise the workers' compensation exclusivity issue.

disability or perceived physical disability." There is, however, a paucity of evidence in the record regarding complainant's actual medical condition. While complainant testified that she had either a back or shoulder injury and stated on her workers' compensation application that she suffered a "rt shoulder pull muscle [sic]," nothing in the record describes, with any particularity, the nature or extent of this condition. Indeed, the only medical description of complainant's condition is contained in her doctor's "return-to-work" slip, which states the words "strain trapezius" under the diagnosis section. While the Department is not necessarily required to produce expert medical testimony, the Department nevertheless must establish, by a preponderance of evidence, that complainant has a medical condition which constitutes a legally cognizable disability. Here, the record simply did not contain sufficient facts to do so. Thus, it is determined that complainant did not have an actual "physical disability" under FEHA.

The Department argues, nonetheless, that on June 15, 1995, and again in August 1995, respondent "regarded" complainant as having a physical disability. Again, the record in this case does not support this contention.

In essence, the Department argues that Donna Rhames, Director of Staff Development at Beverly Manor, "regarded" complainant as being disabled on June 15, 1995, because, after learning that complainant was on "light duty" status, Rhames asked complainant to supply medical verification of her ability to perform the CNA duties. Notably, the record contains substantial conflicting testimony about what occurred on June 15th and on subsequent occasions at Beverly Manor. Reviewing the record as a whole, and attempting to reconcile the discrepancies in testimony, the record establishes the following. On June 15, 1995, complainant had a conversation with Donna Rhames in the lobby of Beverly Manor. During that conversation, complainant told Rhames that complainant's "condition," which she did not specify, was temporary and that she expected that her light duty restrictions would "be over

soon." Based upon that information, Rhames told complainant to provide a doctor's release.1/

The June 15, 1995, conversation does not establish that Donna Rhames regarded complainant as having a disability.

The record shows that on June 15th, Rhames did not know what complainant's condition was, but was simply aware that complainant had been on "light duty" with some restrictions. Thus, the evidence did not establish that Rhames regarded complainant as having any particular condition, much less one that she considered to be a particular physical disability.1/

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2/ Complainant testified that Donna Rhames asked for a doctor's note releasing her to work without any medical restrictions. Other testimony, including parts of complainant's testimony and that of Rhames and Department witness Claudette Anderson, did not expressly substantiate this testimony. Given the lack of clarity in the record, the Hearing Officer concludes that the evidence established that Rhames required some medical verification of complainant's medical condition and any limitations, but not a no-restrictions release.

3/ At most, Rhames was aware that complainant had some sort of temporary and soon-to-be resolved medical condition. This is not a legally cognizable disability (See e.g., 29 C.F.R. Part 1630 App., §1630.2, subd. (j) [temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities]; see also Sanders v. Arneson Products (9th Cir. 1996) 91 F.3d 1351

Moreover, Rhames' request for a doctor's note does not establish that she regarded complainant as being disabled.

Given complainant's representations -- i.e., that complainant had a temporary condition which would resolve itself soon -- it was not unreasonable for Rhames to ask complainant to produce medical verification that she was able to work. Thus, it is determined that on June 15, 1995, respondent did not

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[temporary injury with minimal residual effects is not an ADA disability]).

regard complainant as having a disability within the meaning of FEHA.

The Department also asks the Commission to infer, from circumstantial factors, that in August 1995, Donna Rhames again regarded complainant as having a disability. The record does not contain sufficient evidence to support this position.

While there is conflicting testimony about what happened in August 1995, the record shows that on August 17 or 18, 1995, complainant gave Rhames a "return to work" slip from her doctor. This note, which stated that complainant's diagnosis was a "strain trapezius," made clear that complainant had no work-related restrictions at that time. After complainant submitted the "return to work" slip, Rhames checked complainant's references at College Oak, who told Rhames that complainant was on "medical." At that time, Rhames understood this to mean that complainant was "not well enough" to work. In a telephone conversation the following day, Rhames told complainant about her conversation with College Oak. Complainant responded by explaining that College Oak was mistaken and that complainant was not and never had been on either "medical" or "disability." At hearing, Rhames testified that, based upon the "return to work" slip and complainant's representations that she was able to work, Rhames believed in August 1995 that complainant was not disabled and could perform the duties of a CNA.

These facts do not prove that, in August 1995, Rhames regarded complainant as being disabled. While the evidence establishes that Rhames initially believed complainant was either on "medical" or "disability," Rhames credibly testified that once complainant cleared up that mistaken impression, and after Rhames received the "return-to-work" slip, Rhames believed complainant was able to work.

The Department argues, however, that respondent's failure to hire complainant in or after August 1995 shows that respondent regarded complainant as having a disability. Respondent asserts that it hired a number of preferred student

trainees, and did not hire any non-student CNAs who were willing to work only the night shift. This decision finds that the relevant group of hirees with which to compare complainant are those who were similarly situated -- i.e., non-students who wanted to work the evening or night shift.

To establish respondent's hires during the relevant time period, the Department relies upon a "Joint Compilation" compiled by the Department and respondent. Significantly, the "Joint Compilation" does not provide the actual hire dates<sup>1/</sup> and does not conclusively show how many CNAs were hired for the evening or night shift during the relevant time periods.<sup>1/</sup>

Moreover, nothing in the record, including the "Joint Compilation," conclusively establishes that respondent hired any non-student CNAs for a night shift position from July 15, 1995 -- the date complainant submitted her application -- through September 25, 1995 -- the date complainant began working at another nursing facility. At most, the "Joint Compilation" shows that three non-student CNAs were hired for the evening shift, two of whom may not have been hired during the pertinent time period. Without more relevant data on these hires, especially information about whether they were

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<sup>4/</sup> The compilation includes application dates, the date that Health Questionnaires were completed, and the shift preferences of the persons hired. This information alone is insufficient to determine the actual dates that the CNAs were hired.

<sup>5/</sup> For example, several applicants stated that they would work any shift (day, evening, or night), yet the "Joint Compilation" does not indicate which shifts these persons were actually hired to fill. These individuals could have been hired to work the day shift, a shift complainant did not want to work.

disabled, perceived to be disabled, or had no disabilities,  
this evidence is insufficient to prove that respondent failed  
to hire complainant because it regarded her as being disabled.

Thus, the Department has not established that complainant had an actual or perceived disability within the meaning of the Act and, therefore, the accusation will be dismissed.1/

ORDER

The accusation is dismissed.

Any party adversely affected by this Decision may seek judicial review of the Decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Commission and copies should be delivered to all parties and complainant.

DATED: November 16, 1998

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Jo Anne Frankfurt  
Hearing Officer

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6/ In the accusation, the Department also alleges a violation of Government Code section 12940, subdivision (d). This provision generally prohibits employers from making non-job related medical inquiries which express "any limitation, specification, or discrimination" on the basis of disability. The Department argued, and complainant testified, that on June 15, 1995, respondent asked complainant to complete what she believed to be a health questionnaire. Respondent offered, however, three credible witnesses who testified that respondent gives all health questionnaires only to prospective employees at the post-offer stage. Based upon the weight of the evidence, it is therefore determined that there was no violation of Government Code section 12940, subdivision (d).